IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1187

UNITED STATES OF AMERICA ex rel. SHELDON SELIKOFF,
Petitioner,

against

COMMISSIONER OF CORRECTION OF THE STATE OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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Opinions Below

The opinion of the District Court is reported at 393 F. Supp. 48 (S.D.N.Y. 1975). The opinion of the United States Court of Appeals for the Second Circuit is unreported and appears as petitioner's appendix 1a.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. 1254(1).

Question Presented

Where a plea during trial follows a representation by the trial court not to impose a jail term, is the defendant accorded his constitutional rights where the Court, at the time of sentence, advises the defendant that upon the basis of later information justice requires the imposition of a jail term and affords the defendant, prior to the imposition of sentence, an opportunity to withdraw his plea?

Facts

On August 16, 1972 at a term of the County Court, Westchester County, petitioner was sentenced to state prison for a maximum term of five years after being convicted of the crimes of grand larceny in the second degree and obscenity in the second degree upon his pleas of guilty.* The judgment of conviction was affirmed by the Appellate Division, Second Department with opinion and dissenting opinions at 41 A D 2d 376. The New York Court of Appeals affirmed with opinion at 35 N Y 2d 227 (BREITEL, Ch. J.). Petition for certiorari was denied 419 U S 1122 (1975).

On May 12, 1972, during trial on indictment 997/70 in Westchester County, petitioner withdrew his pleas of not guilty to four indictments against him and entered a plea of guilty to grand larceny in the second degree under the first count of indictment 997/70. At the same time he entered a plea of guilty to obscenity in the second degree under the second count of indictment 606/70. The pleas were entered in full satisfaction of indictments 606/70,

* The District Court states that "the papers indicate that petitioner has served at least two and a half years of the indeterminate term of up to five years to which he was sentenced." The statement is incorrect. Execution of the sentence was stayed until January 3, 1975. When the District Court's opinion was rendered, petitioner had served approximately 3½ months, not 2½ years.

997/70, 998/70 and 999/70. The latter three indictments contained 38 counts arising out of a complicated real estate swindle.

At the time the pleas were entered, the judge said that based on the facts and representations made by the District Attorney's office and defense counsel, it was his opinion that petitioner's incarceration was not required. The Plea Minutes of May 12, 1972 show the following:

> "The Court: At this point Mr. West I would like to place on the record, Sheldon Selikoff, I have had a number of conferences with your attorney and with representatives of the District Attorney's Office with regard to the cases against you. Based upon the results of the conferences and conversations and the fact and representation made to the court, I indicated to the attorney and I am now indicating to you that in my opinion in the interest of justice that no incarceration of you is required and based upon this plea as to what other sentence I shall impose, I do not know and I make no promises. Do you understand that?
>
> Sheldon Selikoff: Yes, sir.
>
> • • •
>
> The Court: What I said Sheldon Selikoff in regard to the plea on the other indictment goes with this plea also. Do you understand that?
>
> Sheldon Selikoff: Yes, sir.
>
> The Court: I will not answer as to what other punishment I shall impose, I will reserve to that."

At the time the pleas were entered, the judge was not aware of the extent of petitioner's participation in the fraudulent scheme. Subsequently, he presided at the continuation of trial of the several co-defendants at which it appeared that petitioner was a principal participant in the fraud. Furthermore, the pre-sentence report indicated that petitioner denied participation in any fraud and de-

nied any guilt involving acts of sexual impropriety. Accordingly, the court informed petitioner that it could not keep the promise of no incarceration and gave him the opportunity to withdraw the pleas. The Minutes of Sentence of August 16, 1972 reflect the following:

> "The Court: . . . At the time that such pleas were entered, this Court was not aware nor was it advised as to the extent of your participation involving the fraudulent scheme which was the basis of the grand larceny in the second degree of Indictment No. 997 of 1970 to which you plead guilty.
>
> This Court therefore, based upon the information it then had, informed you at the time you pleaded guilty that it did not believe that a sentence calling for your incarceration was required in the interest of justice.
>
> Subsequent to this expression of view, however, this Court presided at the trial of the several co-defendants named in the same indictment with you, which trial lasted for some six weeks. From the evidence adduced on behalf of the People's case on this trial, it appeared to this Court that your participation in the fraudulent scheme which was the basis of the larceny alleged in this court of the indictment, as well as the other larcenies alleged in the other indictments, Indictment 998 of 1970 and 999 of 1970, involving thousands of dollars, was not peripheral, subordinate or minor, but rather major and as a principal participant in the fraud.
>
> In light of these facts and circumsances, the Court feels at this time that it cannot in good conscience and in the interests of justice keep the promise here as to no incarceration.
>
> Furthermore, it appears from your pre-sentence report filed by the Probation Department that you deny any participation in any fraud by which sums of money were extracted from money lenders.
>
> Again in regard to the indictment charging you with sexual impropriety, you, according to the presentence report, deny any guilt in any such acts and claim that you are a victim of some persecution.
>
> Now, in view of these circumstances and in the interests of fairness and in the belief that the ends of justice will be served, this Court believes it should allow you to withdraw your pleas of guilty to both of the indictments and have your original plea of not guilty thereto reinstated and that you be given your day in Court to contest the charges of the People.
>
> Accordingly, Mr. Selikoff, this Court hereby grants you the opportunity to withdraw your pleas as heretofore made as to the two indictments.
>
> Now, what is the decision?"

Defense counsel responded that petitioner did not desire to withdraw the pleas; that counsel believed that petitioner had an absolute right to refuse to withdraw the pleas and to permit them to stand; that the defense was not as concerned with petitioner role under indictment 997 as they were with his role under 998 and 999 of 1970; that four indictments were filed against petitioner's and if he were found guilty under any one of these, it could expose him to very serious penalties and that petitioner was entitled to specific performance. Accordingly, it was petitioner's decision to affirm the pleas.

Opinions Below

The New York Court of Appeals rejected petitioner's contention that he was entitled to specific performance of a promised sentence. The court noted that although the state trial judge "did not expressly condition the prospective sentence upon his information at the time of the plea", he stated that the "prospective sentence was based on information then known and representations then made", and "by the strongest necessary implication, the

court was indicating the conditional foundation of the 'promise' ". In any case "there are policy considerations which go beyond the literal reading of the plea minutes", in that "any sentence 'promise' at the time of plea is, as a matter of law and strong public policy conditioned upon its being lawful and appropriate in light of the subsequent pre-sentence report or information obtained from other reliable sources." Hence, the fact that the court "did not explicitly condition its 'promise' (although the implication could hardly be clearer) upon its later evaluation after reading the pre-sentence report, or the facts it learned from the trial of the co-defendants, is therefore of no consequence." *People* v. *Selikoff*, 35 N Y 2d 227, 237-238 (1974).

The District Judge likewise recognized that petitioner was not entitled to specific performance of an alleged promise. Nevertheless, he ruled that due process required the state judge to "vacate the guilty pleas *sua sponte*, thereby permitting the petitioner to weigh his alternatives of going to trial on all the charges or entering guilty pleas anew without coercion or fear of offending the court."

The Circuit Court reversed the holding of the District Court. The Court observed that the New York legislature has by statute denied trial judges the authority to make any unconditional sentence promises to a defendant convicted of a felony prior to pre-sentence investigation and report. New York Criminal Procedure Law, 390.20(1) (McKinney 1971). Moreover, the Court stated that even if the defendant relied on the judge's statements, the defendant by being given the opportunity to replead by the trial court had already been accorded any relief to which he was entitled. Citing *Santobello* v. *New York*, 404 U.S. 257 (1971), the Circuit Court rejected petitioner's attempt to impose principles of contract upon the plea bargaining process.

ARGUMENT

Petitioner's application for a writ of certiorari raises no substantial federal question.

Petitioner instituted his application for a federal writ of habeas corpus seeking specific performance of a representation by the trial court at the time of petitioner's plea to grand larceny and obscenity in the second degree that the trial court, upon the facts as it then understood them, would impose no jail term at the time of sentencing.* Petitioner sought a holding that the trial judge, despite the information as to petitioner's demonstrated greater fraudulent participation, could not withdraw the representation, give petitioner an opportunity to withdraw his plea and upon his refusal, sentence him to imprisonment.

However, as the Circuit Court held, petitioner was not entitled to specific performance and petitioner was accorded the relief to which he was entitled when he was allowed to replead. *Santobello* v. *New York*, 404 U.S. 257, 263 (1971). In *Santobello* this Court specifically left it to the discretion of the State court to decide whether the circumstances of the case require that a plea bargain be specifically enforced or that a defendant be afforded an opportunity to withdraw his plea.

Alternatively, petitioner argues, in an effort to circumvent *Santobello*, that the trial court's refusal to stand by its no jail term representation ran afoul of the constitutional prohibition against double jeopardy. The injection

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* One week prior to sentencing, the trial court informed the defendant that further facts had come to its attention and it could no longer comply with its prior representation as to no jail term and the Court offered petitioner an opportunity to withdraw his plea.

by petitioner of a double jeopardy claim is frivolous, and, in the context of this case, quite beside the point.

Double jeopardy is a personal right that must be presented to the trial court or it is waived. *United States* v. *Scott,* 464 F. 2d 832 (D.C. Cir. 1972); *United States* v. *Buonomo,* 441 F. 2d 922 (7th Cir. 1971), cert. den. 404 U.S. 845. The trial was terminated at petitioner's request to allow him to plea. When offered an opportunity to disavow his plea, petitioner chose to reaffirm his original decision to plead to grand larceny in the second degree and did not withdraw his plea and then oppose retrial on the ground of double jeopardy. Under these circumstances, petitioner has failed to preserve any double jeopardy claim for review.

Moreover the ingenuousness of his belatedly urged double jeopardy claim is seriously open to doubt. At the time of the plea, petitioner had only started trial on one of the four indictments against him. As his attorney pointed out, petitioner was quite concerned about the charges in the indictments that had not gone to trial, 998/70 and 999/70, and which had been covered by his plea of grand larceny in the second degree. Indictment 999/70 had included a count of grand larceny in the first degree which carried a maximum of fifteen years while grand larceny in the second degree carried a maximum of only seven years.

Finally, even assuming *arguendo* only that petitioner had preserved a credible double jeopardy claim for review, petitioner's double jeopardy argument was put to rest by this Court in *United States* v. *Tateo,* 377 U.S. 463 (1964).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York, April 2, 1976.

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